# IN THE UNITED STATES DISTRICT COURT
# FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

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| MAUREEN BRYANT,<br>*Plaintiff,*<br><br>v.<br><br>WASHINGTON MUTUAL CORPORATION,<br><br>HOWARD BIERMAN, AND<br><br>BIERMAN, GEESING, & WARD, LLC<br>*Defendants.* | CIVIL NO. 6:07cv00015<br><br>MEMORANDUM OPINION AND ORDER<br><br>JUDGE NORMAN K. MOON |

This matter is before the Court on Plaintiff's fourth Motion for Default Judgment and Defendants' Motion for Extension of Time to File a Response to Plaintiff's Complaint.[1] For the reasons stated below, I will grant Defendants' Motion for Extension of Time and deny Plaintiff's Motion for Default Judgment.

## BACKGROUND

This case arises out of Plaintiff's attempt to pay off the mortgage on her home, which was held by Defendant Washington Mutual Bank,[2] with a Bill of Exchange in the amount of $244,663.79. According to Plaintiff's second amended complaint, Washington Mutual initially told her that the Bill of Exchange had been lost but eventually informed her that the Bill of Exchange was an unacceptable form of payment.[3] Washington Mutual initiated foreclosure

[1] Also pending is Defendants' Amended Motion to Dismiss Plaintiff's Second Amended Complaint. The time for Plaintiff to respond, however, has not yet expired, and the motion is therefore not yet ripe for decision.
[2] In her suit, Plaintiff names "Washington Mutual Corporation," which, according to Defendants, is a non-existent entity. Washington Mutual Bank has, however, voluntarily appeared, and any issue as to the use of an incorrect name need not be resolved at this time.
[3] The validity of the Bill of Exchange is one of the principal issues on which the parties disagree, but it need not, and

proceedings and contracted with Defendant Bierman, Geesing & Ward, LLC to perform the foreclosure sale.[4] Following the foreclosure sale, Plaintiff filed the instant action, in which she proceeds pro se.

After Defendants were allegedly late in responding to her initial complaint, Plaintiff filed a Motion for Default Judgment, which I denied on July 3, 2007. On July 5, Plaintiff filed a letter that was construed as, among other things, a second motion for default judgment. On July 19, Plaintiff filed another letter, which was construed as a third motion for default judgment. I denied these motions on July 20, the same day that Plaintiff filed an amended complaint. Undeterred, Plaintiff filed a Renewed Motion for Default Judgment on August 7. As with the other three motions, Defendants filed a memorandum in opposition, but this time requesting sanctions against Plaintiff. I heard oral arguments on August 31, at which time I ordered Defendants to file a motion for an extension of the time to respond to Plaintiff's original complaint. Defendants did so on September 10, 2007.

## DISCUSSION

Plaintiff bases her claims for a default judgment on two related but independent grounds. First, Plaintiff argues that she is entitled to judgment in her favor because Defendants were in default by their failure to timely serve their response to her original complaint. Second, Plaintiff argues that a default judgment should be entered in her favor because Defendant Bierman committed an "act of perjury" (Pl.'s Renewed Mot. Default J. 2) in the Certificate of Service attached to Defendants' response to her original complaint.[5] I will address both of these in turn.

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will not, be decided at this stage in the proceedings.

[4] Defendant Howard Bierman is a partner in Bierman, Geesing & Ward, LLC whom Plaintiff dealt with during the foreclosure process.

[5] In Defendants' initial filings, Defendant Bierman, who is an attorney, signed the certificates of service.

*Untimely Service of Defendants' Response*

Plaintiff is correct that the summonses required that Defendants serve their response to the original complaint by June 28, 2007. On June 28, Defendants filed their response, a motion to dismiss, with the Court. Defendants also made arrangements on that date with United Parcel Service (UPS) to deliver the response to Plaintiff via overnight delivery. UPS did not actually pick up the package containing the response, however, until June 29. Because June 29 was a Friday, Plaintiff did not receive the motion to dismiss until the following Monday, July 2.

In addressing whether this entitles Plaintiff to a default judgment, I should first address what appears to be a fundamental misconception on Plaintiff's part. In her renewed motion, Plaintiff states that she "was not served until August 2nd." (Pl.'s Renewed Mot. Default J. 2.) This is incorrect. As stated in Federal Rule of Civil Procedure 5(b)(2)(B), "Service by mail is complete on mailing." Accordingly, the date on which Plaintiff actually received the motion to dismiss is irrelevant for purposes of determining whether Defendants were in default.[6] Rather, the only question is whether Plaintiff was served on June 28, the day the shipping information was transmitted to UPS, or June 29, the day UPS actually picked up the package.[7] Stated differently, the question is whether service of Defendants' response was timely or one day late.

As I have previously explained, however, I need not answer this question because any default as to Defendants' response to Plaintiff's original complaint was mooted by the filing of Plaintiff's first amended complaint (and now, the filing of her second amended complaint). *See Duda v. Bd. of Educ.*, 133 F.3d 1054, 1057 (7th Cir. 1998) (stating that an amended complaint

[6] The apparent unfairness of the rule that service is complete on mailing is remedied by Rule 6(e), which gives a party who is served by mail three extra days in which to respond. Fed. R. Civ. P. 6(e).

[7] Although, some circuits have held that service by a private delivery service such as UPS or FedEx is not a valid form of service by mail, s*ee Audio Enterprises, Inc. v. B&W Loudspeakers, Inc.*, 957 F.2d 406, 409 (7th Cir. 1992); *Prince v. Poulos*, 876 F.2d 30, 32 n.1 (5th Cir. 1989), the Fourth Circuit has not addressed the issue. Inasmuch as Plaintiff disputes only the date of service, not the fact of service, I will assume without deciding that service by UPS satisfies the requirement of "[m]ailing a copy to the last known address of the person served," and is therefore a valid form of service. Fed. R. Civ. P. 5(b)(2)(B).

supersedes an original complaint and renders it of no legal effect); *Vanguard Fin. Serv. Corp. v. Johnson*, 736 F. Supp. 832, 835 (N.D. Ill. 1990); *Nelson v. Nationwide Mortgage Corp.*, 659 F. Supp. 611, 615 (D.D.C. 1987). Although I believe that this reason is sufficient of itself to justify denying Plaintiff's motion for default judgment, I will nevertheless address Plaintiff's argument on its merits.

In each of her four motions, Plaintiff identifies the same source for her claimed entitlement to default judgment, that is, the statement in the summons to each defendant that the defendant is "required to serve on Plaintiff's attorney an answer to the complaint which is served on you with this summons, within 20 days after service of this summons . . . . *If you fail to do so, judgment by default will be taken against you* for the relief demanded in the complaint." Summons in a Civil Case (emphasis added). Plaintiff urges that "the words of the Court . . . should mean what they say." (Pl.'s Renewed Mot. Default J. 2.)

As an initial proposition, it is not entirely clear that Defendants failed to comply with the time requirement. One could argue that the date on which the shipping information is transmitted to UPS, which UPS identifies in its records as the date a package was "Shipped or Billed on" ((Pl.'s Renewed Mot. Default J. 7), is the date of mailing, regardless of when UPS picks the package up.

Even assuming, however, that Defendants mailed their response one day late and were therefore in default, Plaintiff misunderstands the purpose of the warning in the summons that "[i]f you fail to do so, judgment by default will be taken against you." Plaintiff apparently believes that this language imposes a mandatory requirement that a judgment be entered against any party in default, regardless of the seriousness of the default or any mitigating circumstances. When the warning is read in isolation, Plaintiff's interpretation is perhaps plausible. When read

in the context of the Federal Rules of Civil Procedure as a whole, however, it becomes clear that Plaintiff's interpretation of the warning in the summons is untenable.

The language in the summons is required by Rule 4(a): "[The summons] shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint." Fed. R. Civ. P. 4(a). Yet as Rule 55 makes clear, entry of judgment by default is by no means mandatory; rather the Court has discretion to determine whether a judgment by default should be entered, and even after it is entered, whether a default judgment should be set aside. Fed. R. Civ. P. 55(b)–(c). "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when defendant is technically in default." 10A Charles Alan Wright et al., *Federal Practice and Procedure: Civil* § 2685 (3d ed. 1998) (citing cases).

To accept Plaintiff's interpretation of the warning in the summons, I would have to find that Rule 4 and Rule 55 are inconsistent and incompatible. This I decline to do. Rather, when viewed in the proper context, Rule 4 and Rule 55 are clearly not in conflict. The language in the summons appears calculated merely to warn a defendant of the "worst-case scenario," as well as to encourage compliance and to satisfy the need for prior notice in those situations where a court determines that a defendant's failure to timely respond does, in fact, warrant a default judgment. Not only is this view of the warning in the summons preferable because it avoids bringing Rules 4 and 55 into conflict, it is also consistent with sound public policy. "[A] default judgment . . . represents in effect 'an infringement upon a party's right to trial by jury under the seventh amendment' and runs counter to 'sound public policy of deciding cases on their merits,' and against depriving a party of his 'fair day in court.'" *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d

494, 503–504 (4th Cir. 1977) (citations omitted); *see also* 10A Wright, *supra*, § 2681 ("Under modern procedure, defaults are not favored by the law . . . . The reason for this attitude is that contemporary procedural philosophy encourages trial on the merits."); 10 James Wm. Moore, *Moore's Federal Practice* § 55.20[2][c] (3d ed. 1997) ("Default judgments are generally avoided by the courts, since there is a strong policy in favor of decisions on the merits and against resolution of cases through default judgments.").

Accepting, then, that I may exercise discretion, I cannot enter a default judgment in favor of Plaintiff on these facts. In essence, Plaintiff asks that I award her roughly a quarter of a million dollars because Defendants mailed their response a single day late.[8] Surely, even Plaintiff can see that this would be a harsh result indeed. I recognize that Plaintiff believes that she properly paid-off the mortgage and is therefore entitled to her property, but Plaintiff must recognize that Defendants believe they are entitled to it, too. Plaintiff asks that I give her the relief she seeks without first deciding who is correct. Given the value of the property and the other claims at issue, as well as the minimal nature of Defendants' default, the ends of justice would not be served by doing so.

The fundamental unfairness of entering a default judgment under these circumstances becomes even more apparent when one considers the fact that Plaintiff likely suffered no prejudice due to Defendants' tardiness. Had Defendants mailed their response by normal, first-class U.S. mail on June 28, in which case there would be no default, it is highly unlikely that Plaintiff would have received it any sooner than the response Defendants did send by overnight delivery on June 29.

Moreover, I have been more than patient with Plaintiff in overlooking or excusing minor

[8] As previously stated, I will address Plaintiff's claim for default judgment based on Defendant Bierman's alleged perjury separately.

defects in her compliance with the Rules of Procedure and with my orders. For example, Plaintiff filed disclosure material in contravention of paragraph 12 of the Pretrial Order, filed her second amended complaint without first seeking leave of the Court as required by Rule 15(a), and fails in many of her filings to comply fully with Rules 7(b), 10(a), and 11(a). This is not to criticize Plaintiff or her efforts, but simply to point out that Defendants are not the only ones who have made minor technical errors in this case. Inasmuch as I have overlooked Plaintiff's errors or allowed her to correct them, when the harm to Defendants is minimal, it is only fair and just that Defendants be given at least some of the same latitude.

Defendants' have also filed a Motion for Extension of Time to File a Response to Plaintiff's Complaint. Although the motion was filed well after June 28, the Court may nonetheless retroactively extend the 20 days afforded by the summonses where the "failure to act" in a timely manner "was the result of excusable neglect." Fed. R. Civ. P. 6(b). In a sworn affidavit, Defendant Bierman states:

> 2. That the Certificate [of Service accompanying the motion to dismiss] stated Defendants' Motion was served by "first-class mail, postage prepaid" upon Plaintiff.
>
> 3. That Howard Bierman signed the Certificate with the intent and belief that Defendants' Motion would be sent as indicated in the Certificate.
>
> 4. That Howard Bierman then gave Defendants' Motion to an associate . . . to be sent by U.S. First-Class Mail.
>
> 5. That delivery by UPS was done without Howard Bierman's knowledge or consent.
>
> 6. That there was no intent on the part of Howard Bierman to commit fraud upon either the Plaintiff or the Court.

(Bierman Aff. ¶ 2–6.)

There is no evidence suggesting that these statements are anything but true. I recognize that Plaintiff feels she has been lied to by Defendants in her dealings with them prior to this case. Those prior dealings, however, are not at issue on Plaintiff's motion for a default judgment.

Furthermore, overnight delivery via UPS is substantially more expensive than a postage stamp, and as previously explained, Plaintiff most likely received the motion as soon or sooner than if it had been served on time by first-class U.S. mail. To say, then, that Defendants intentionally mailed the motion a day late is to say that they incurred unnecessary expense and *risked a default judgment* for no benefit or advantage whatsoever. That simply does not make reasonable sense and therefore tends to confirm that the tardiness of Defendants' service was unintentional.

Certainly, Defendant Bierman was responsible for ensuring that his certification was accurate, and his failure to do so was neglectful. I find, however, that the neglect was excusable because (1) Plaintiff suffered little or no prejudice, (2) the resulting delay was negligible, and (3) Defendants' explanation is reasonable, and there is no evidence of intent or a lack of good faith. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (describing the circumstances that may constitute excusable neglect). Accordingly, Defendants' Motion for Extension of Time will be granted, and the time for serving their response to Plaintiff's original complaint will be retroactively extended to July 2, 2007, the date on which Plaintiff actually received Defendants' response. The time being thus extended, Defendants' response was not late, and they were therefore not in default. As a result, Plaintiff's motion for a default judgment on the basis of an untimely response to her complaint must fail.

*Defendants' Alleged Perjury*

Plaintiff has also argued that she is entitled to a default judgment because Defendant Bierman allegedly committed an "act of perjury" (Pl.'s Renewed Mot. Default J. 2) in certifying that Defendants' response was mailed on June 28, 2007, when in reality it was not picked up for delivery until June 29 and it was not "mailed" at all, inasmuch as it was sent by UPS rather than U.S. mail.

According to *Black's Law Dictionary*, perjury is "[t]he act or an instance of a person's deliberately making material false or misleading statements while under oath." *Black's Law Dictionary* (8th ed. 2004). Thus, the statements in Defendant Bierman's certification cannot be perjury because they were not made under oath.[9] Moreover, in his affidavit, which was made under oath, Defendant Bierman makes clear that he did not *deliberately* make any false statements in the certification. Further supporting the affidavit is the fact that it would have made no sense for Defendants to intentionally mail their response a day late, as explained above. Accordingly, Plaintiff's claim for a default judgment based on perjury must fail.

*Defendants' Request for Sanctions*

In their August 27, 2007 response to Plaintiff's Renewed Motion for Default Judgment, Defendants requested that I impose sanction on Plaintiff pursuant to 28 U.S.C. § 1927. I will deny Defendants' request without prejudice. Plaintiff is hereby advised that with this Order, the issue of a default judgment based on Defendants' response to the original complaint is now closed. Should Plaintiff insist on again asking the Court for a default judgment on these same facts, I will revisit the issue of sanctions.

**CONCLUSION**

In summary, for the above-stated reasons:

(1) Defendants' Motion for Extension of Time (docket entry no. 27) is hereby GRANTED;

(2) the time for Defendants to serve their response to Plaintiff's original complaint is

[9] Although not made under oath, statements in a certificate of service are subject to the requirements of Rule 11. But even if I were to find that Defendants had violated Rule 11, which I do not, default judgment is not an appropriate sanction under the rule. Fed. R. Civ. P. 11(c)(2). Furthermore, Plaintiff has not satisfied the requirements for a Rule 11 motion for sanctions. Fed. R. Civ. P. 11(c)(1)(A).

hereby EXTENDED to July 2, 2007, and Defendants' response is therefore deemed timely;

(3) Plaintiff's Renewed Motion for Default Judgment (docket entry no. 16) is hereby DENIED; and

(4) Defendants' request for sanctions (docket entry no. 22) is hereby DENIED.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
United States District Judge

_____
Date